STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On its Own Motion	)	
	)	No. 00-0586
Adoption of 83 Illinois Administrative Code 550, Non-Discrimination in Affiliate Transactions for Gas Utilities.	)	

Comments of Nicor Gas

Northern Illinois Gas Company d/b/a Nicor Gas ("Nicor Gas" or "Company") hereby submits its comments to proposed Part 550 of the Commission's regulations, governing non-discrimination in affiliate transactions for gas utilities. Nicor Gas believes that, if the Commission enacts gas affiliate rules, it may not adopt a more stringent regulation regarding joint marketing and advertising for gas utilities than for electric utilities. Even more fundamentally, the Company believes that, as a matter of law, the proposed regulations are beyond the authority of the Commission to enact.

I. If Joint Marketing and Advertising Regulations are Promulgated by the Commission, the Regulations Applicable to Gas Utilities Should Not Be More Stringent Than Those Applicable to Electric Utilities.

If the Commission enacts regulations governing gas utility affiliate transactions, no principled reason exists to make the restriction on joint marketing and advertising for gas utilities more stringent than for electric utilities. Section 550.30(a) of the proposed rules, as originally published in the Illinois Register, provided that "A gas utility shall neither jointly advertise nor jointly market its services or products with those of an affiliated interest." 24 Ill.

Reg. 14114 (Sept. 22 , 2000). However, the analogous provision of the electric affiliate rule, 83 Ill. Adm. Code 450.25(a), provides that "An electric utility shall neither jointly advertise nor jointly market its services or products with those of an affiliated interest in competition with ARES." (Emphasis added.) Staff has indicated its willingness to add the phrase "in competition with ARGs" to Section 550.30(a), to make it parallel to the electric rule, provided that Staff's position on all other issues is supported by the parties. Even if all parties do not support Staff's position on all other issues, however, Nicor Gas urges the Commission to change Section 550.30(a) to make it parallel to Section 450.25(a).

The issue of joint advertising and joint marketing was heavily contested during extensive hearings in the Commission's rulemaking proceeding addressing electric utility affiliates. People of Cook County et al., Docket Nos. 98-0013 and 98-0035 (consol.), 1998 Ill. PUC LEXIS 777 (Sept. 14, 1998). To resolve the matter, the Commission adopted Section 450.25(a), which restricts joint marketing and advertising only for those affiliated interests in competition with an alternate retail supplier. Id. The Commission's compromise was upheld on appeal. Illinois Power Co. et al. v. Commerce Comm'n et al., 316 Ill. App. 3d 254, 736 N.E.2d 196 (5th Dist. 2000).

It is well-established that an agency changing its course must supply a reasoned analysis. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (1970), cert. denied 403 U.S. 923 (1971); Motor Vehicle Manufacturers Assoc., et al. v. State Farm Mutual Auto. Ins. Co. et. al., 463 U.S. 29, 55; 103 S. Ct. 2856; 77 L. Ed.2d 443 (1983). In this case, there is no basis for deviating from the position on joint marketing adopted by the Commission in Section 450.25(a) and recently upheld by the appellate court.

First, there is no basis for imposing a more stringent affiliate rule on gas utilities than on electric utilities. The electric affiliate regulations were promulgated by the Commission at the inception of electric competition, at the express direction of the General Assembly, to guide in the transition to a competitive electric industry. The gas industry, in contrast, has been competitive on the supply side for approximately 15 years. See., e.g., Northern Illinois Gas Co., Docket No. 85-0053 (revisions to Rider 25); Northern Illinois Gas Co., Docket No. 88-0277 (June 21, 1989). The existence of a robust, competitive gas supply market in itself demonstrates that existing regulatory oversight has been effective as applied to the gas industry, and that affiliate regulations more stringent than those imposed on electric utilities are not warranted.

Moreover, the significant difference in the scope of competition permitted by the General Assembly for gas and electric utilities warrants less stringent – not more stringent – regulation for gas utilities than electric utilities. Under the electric deregulation legislation, 220 ILCS 5/16-113, electric utilities are permitted to offer a variety of competitive services, in addition to electric power and energy, at market-based rates. Gas utilities do not have similar authority. This expanded scope of electric competition makes affiliate separation more important for electric than gas utilities. Consequently, the Commission should not impose a more restrictive joint marketing rule on gas utilities than it recently imposed on electric utilities.

In any event, there is no evidentiary record in this case and no basis for the Commission to determine that its position on joint marketing should be altered. Accordingly, Section 550.25(a) should be modified as indicated in Staff's Settlement Draft of Part 550 by adding the phrase "in competition with ARGs."

II. The Proposed Affiliate Rules are Beyond the Authority of the Commission.

In this proceeding, the Commission proposes to implement regulations governing affiliate transactions for gas utilities that are generally analogous to those implemented by the Commission in 1998 for electric utilities. See 83 Ill. Adm. Code Part 450. In the case of electric utilities, the affiliate rules were promulgated by the Commission pursuant to a very specific legislative delegation contained in Section 16-121 of the Electric Service Customer Choice and Rate Relief Law of 1997 ("Customer Choice Law"), 220 ILCS 5/16-121. In Section 16-121, the General Assembly directed the Commission to:

> adopt rules and regulations no later than 180 days after the effective date of this amendatory Act of 1997 governing the relationship between the electric utility and its affiliates, and ensuring non-discrimination in service provided to the utility's affiliate and any alternative retail electric supplier, including without limitation, cost allocation, cross-subsidization and information sharing.

In addition to restructuring the electric industry in Illinois, the Customer Choice Law made numerous changes affecting gas utilities, including amendments to the statute governing transactions with affiliates, 220 ILCS 5/7-101. However, the General Assembly did not direct the Commission to adopt broad rules and regulations governing relationships between gas utilities and their affiliates.

In fact, when the General Assembly enacted the Customer Choice Law, the Commission had in effect regulations implementing Section 7-101, and had issued a host of utility-specific orders approving transactions between utilities and their affiliated interests. See 83 Ill. Adm. Code Part 310; see, e.g., Northern Illinois Gas Co., Docket No. 60256 (Feb. 11, 1976); The Peoples Gas Light & Coke Co. and North Shore Gas Co., Docket No. 55071 (Sept. 10, 1969 and Nov. 13, 1974). In addition, as noted above, when the General Assembly enacted the Customer

Choice Law mandating retail competition in the electric industry, retail competition in the gas industry had been a reality for approximately 15 years. See, e.g., Northern Illinois Gas Co., Docket No. 85-0053 (revisions to Rider 25); Northern Illinois Gas Co., Docket No. 88-0277 (June 21, 1989).

When it directed the Commission to enact affiliate transaction rules for electric utilities only, the General Assembly was clearly concerned that the Commission's rulemaking authority, as well as its existing rules and orders addressing electric affiliate transactions, were insufficient to ensure non-discrimination in an deregulated electric environment. If the General Assembly had had similar concerns regarding gas utilities, it could and would have provided the Commission with further rulemaking authority over gas affiliate transactions in the Consumer Choice Law. But the General Assembly did not do so. Under well-established rules of statutory construction, "the expression of one thing in an enactment excludes the other, even if there are no negative words prohibiting it. Illinois Bell Tel. Co. v. Commerce Comm'n, 203 Ill. App. 3d 424, 438, 561 N.E.2d 426, 436 (2d Dist. 1990). Thus, the General Assembly's failure to delegate the same rulemaking authority regarding gas utilities as it did regarding electric utilities means that the General Assembly did not intend for the Commission to exercise the same rulemaking authority with respect to gas utilities as electric utilities.

Moreover, while the Commission has general rulemaking authority to adopt "reasonable and proper rules and regulations" (220 ILCS 5/10-101), the Illinois Supreme Court has repeatedly held that, to be valid, a legislative delegation of power to an administrative agency must identify the persons and activities subject to regulation, the harm sought to be prevented, and the general means intended to be available to the agency to prevent the harm. Stofer v.

Motor Vehicle Casualty Co., 68 Ill. 2d 361, 372, 369 N.E.2d 875 (1977); Thygesen v. Callahan, 74 Ill. 2d 404, 409, 385 N.E.2d 699 (1979). The Commission's authority to promulgate regulations regarding gas utility affiliate transactions comes only from the general provision of Section 10-101.[1/] However, this delegation – unlike the delegation with respect to electric utilities in Section 16-121 – falls far short of the standards articulated in Stofer and Thygesen because, inter alia, it does not identify the harm to be prevented in gas utility transactions with affiliated interests.[2/]

Further, the Commission has no power beyond that expressly conferred upon it in the Public Utilities Act. Business and Professional People for the Public Interest v. Commerce Comm'n, 136 Ill. 2d 192, 243-244, 555 N.E.2d 693, 716-717 (1989); Commerce Comm'n ex rel East St. Louis v. East St. Louis & C. Ry. Co., 361 Ill. 606, 611, 198 N.E. 716, 718 (1935); see also Illinois Bell, 203 Ill. App. 3d at 438, 561 N.E.2d at 436 and cases cited therein.[3/] Consequently, no matter how desirable some may believe it to be to have symmetrical rules for electric and gas utility affiliate transactions, the Commission does not have authority to enact the

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[1/] Section 7-101, addressing affiliate transactions of both gas and electric utilities, contains its own rulemaking authority. That delegation of authority, however, is narrowly limited to reporting requirements and rules permitting the Commission to waive the need for filing and approval of certain contracts and arrangements, and cannot reasonably be read to authorize the broad affiliate rules that have been proposed in this proceeding. 220 ILCS 5/7-101(2) and (4).

[2/] Section 16-121 very specifically identifies the potential harm as discrimination in services provided to affiliates and alternate retail electric suppliers, "including without limitation, cost allocation, cross subsidization and information sharing." 220 ILCS 5/16-121.

[3/] The only implied powers that an administrative agency has are those which are incident to and included in the authority expressly conferred. See Schalz v. McHenry County Sheriff's Dept. Merit Comm'n, 113 Ill. 2d 198, 202-206, 497 N.E.2d 731, 733-734 (1986). In light of the express delegation of power to regulate electric utility affiliate transactions, a similar power to regulate gas utility affiliate transactions cannot be implied.

broad regulations proposed in this proceeding. See Bio-Medical Laboratories, Inc. v. Trainor, 68 Ill. 2d 540, 551, 370 N.E.2d 223, 228 (1977) (desirability of a regulation is not sufficient to empower an agency to enact it).

For the foregoing reasons, the Commission should insert the words "in competition with ARGs" at the end of proposed Section 550.30(a) or, in the alternative, dismiss this rulemaking proceeding.

Respectfully submitted,

NORTHERN ILLINOIS GAS COMPANY
d/b/a NICOR GAS

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February 9, 2001

STATE OF ILLINOIS)
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COUNTY OF C O O K)

Stephen J. Mattson, being first duly sworn upon oath, states that he is an attorney for Northern Illinois Gas Company, d/b/a Nicor Gas Company; that he has read the foregoing Comments by him subscribed and knows the contents thereof; and that the statements therein contained are true to the best of his knowledge and belief.

Stephen J. Mattson

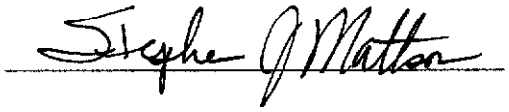
SUBSCRIBED AND SWORN
to before me this 9th day of
February, 2001.

Jeanne M. Layden
Notary Public

"OFFICIAL SEAL"
Jeanne M Layden
Notary Public, State of Illinois
My Commission Exp. 06/17/2003

CERTIFICATE OF SERVICE

I, Stephen J. Mattson, hereby certify that a copy of the foregoing Comments of Nicor Gas Company were served upon the parties listed on the attached Service List, by e-mail and by first class mail, postage prepaid on February 9, 2001.



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